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In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-611

UNITED STATES OF AMERICA, et al.,
Petitioners,

v.

C. D. KASMIR and JERRY A. CANDY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court is unreported. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 499 F. 2d 444.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth and Fifth Amendments of the United States

Constitution. Sections 7402(b), 7602, and 7604(a) of the Internal Revenue Code of 1954, 26 U.S.C.

QUESTIONS PRESENTED

1. Whether possession of records by the taxpayer's attorney previously in the actual possession of the taxpayer constituted sufficient constructive possession by the taxpayer to warrant his assertion of the privilege against self-incrimination.

2. Whether taxpayer's attorney had standing to raise taxpayer's privilege against self-incrimination in an enforcement proceeding against the attorney.*

STATEMENT OF THE CASE

On January 3, 1973, the taxpayer, Dr. Edward J. Mason, was visited at his office in Dallas, Texas, by two Special Agents of the Internal Revenue Service who informed Dr. Mason that his tax returns for the years 1969, 1970, and 1971 were under investigation. (R. 59-60)[1] The agents advised Dr. Mason of his constitutional rights, including his right not to incriminate

* In the Fifth Circuit, Respondents also urged a Fourth and Fifth Amendment claim not recognized by the Government in its Petition. They argued that to make the predictable transfer of records from a taxpayer to his attorney the occasion for the loss of Fifth Amendment rights would render the Internal Revenue Service's own Miranda warning deceptive and would violate the taxpayer's Fourth Amendment right against unreasonable search and seizure since the use of fraud, deceit or trickery in gaining access to incriminating evidence makes an otherwise lawful search unreasonable and unconstitutional. See I.R.S. News Release IR-949 (1969), CCH Fed. Tax Rptr. ¶6946. Cf. *Gould v. United States*, 255 U.S. 298 (1921); *United States v. Tarlowski*, 305 F.Supp. 112, 124 (E.D. N.Y. 1969). The Fifth Circuit did not rely on this ground for its decision. However, this Fourth and Fifth Amendment claim further supports the decision below and will be urged by the Respondents in the event that a Writ of Certiorari is granted.

[1] "R." references are to the separately bound appendix filed in the Court of Appeals.

himself and his right to counsel (R. 60, 70-71), and informed Dr. Mason that one of the functions of a Special Agent was to investigate the possibility of criminal violations of the Internal Revenue laws and that anything Dr. Mason said or submitted to them might be used against him in a criminal proceeding (R. 71).

During the course of the ensuing conversation, Special Agent Mabrey asked to see Dr. Mason's personal books and records. Dr. Mason then placed certain records on his desk; records which are not involved in this case, which the Government admits are privileged and which the Government does not seek (R. 123-124). In response to Mabrey's request, however, Dr. Mason placed a call to his accountant, Jerry Candy, one of the Respondents herein (R. 61, 83), in order to obtain tax records then in the possession of Tannebaum, Bindler & Lewis, the accounting firm where Mr. Candy was employed (R 79-80) and which had handled the preparation of Dr. Mason's tax returns for the years in question (R. 81). However, when Mr. Candy learned that Dr. Mason was visiting with two Special Agents, he advised Dr. Mason not to show any of his records to the Special Agents (R. 61, 83-84), and Dr. Mason withdrew the records on his desk and concluded the interview (R. 63-64).

Following Dr. Mason's call to Mr. Candy, Candy called Cyril Kasmir, the other Respondent herein, a duly licensed attorney (R. 103), and informed him of the Special Agents' visit to Dr. Mason's office (R. 83, 97-98). At Candy's request, Mr. Kasmir called Dr. Mason and was retained by the taxpayers that same afternoon (R. 100).

Early the next morning, at the direction of his employer, Tannebaum, Bindler & Lewis, Mr. Candy delivered a quantity of files and records to Dr. Mason (R. 98). Dr. Mason received the files and records, gave Mr. Candy a receipt for them (R. 98-99) (Exhibit 6, Ex. Vol. at 9), and after about five to ten minutes of deliberations, Dr. Mason placed the records in the custody of his attorney, Mr. Kasmir (R. 88, 99).

The following day, January 5, 1973, summonses were served on Mr. Candy and Mr. Kasmir, ordering them to appear before Special Agent Mabrey on January 15, 1973, and then and there to give testimony and to produce for examination the following records of Tannebaum, Bindler & Lewis:

1. Accountant's work papers pertaining to Dr. E. J. Mason's books and records of 1969, 1970, and 1971.
2. Retained copies of Dr. E. J. Mason's income tax returns for 1969, 1970, and 1971.
3. Retained copies of reports and other correspondence between Tannebaum, Bindler and Lewis and Dr. E. J. Mason during 1969, 1970, and 1971 (R. 8-11).

Candy and Kasmir appeared on January 15, 1973, as directed, but refused to testify or to turn over any records to the Special Agents. Mr. Candy left a prepared statement with the Special Agents stating, in substance, that prior to the time he was served with the summons he had delivered the records described to Dr. Mason. He also refused to answer any questions on the grounds of the attorney-client privilege relating to any assistance he was providing Mr. Kasmir who had retained him to assist in analyzing the books and records of Dr. and Mrs. Mason regarding any potential tax liability for the years 1969, 1970, and 1971 (R. 25).

Mr. Kasmir also left a written statement with the Special Agents. He stated that he had been retained by Dr. and Mrs. Mason to represent them with respect to their income tax liability for the years 1969, 1970, and 1971, in connection with the audit of their income tax returns and the examination being conducted by the Internal Revenue Service. He declined to testify on the grounds of the attorney-client privilege and declined to produce records on behalf of his clients based upon the Fourth Amendment's protection against unreasonable search and seizure and the Fifth Amendment privilege against self-incrimination (R. 26).

On or about March 21, 1973, the United States Attorney filed a Petition to Enforce the Internal Revenue Summons pursuant to Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954, 26 U.S.C. §7402(b) and §7604(a), and an Order To Show Cause issued on March 21, 1973, setting a hearing on the Government's Petition for March 28, 1973 (R. 1, 12). Respondents herein filed a sworn Response to the Order To Show Cause and a Motion To Quash Summons (R. 13) in which Mr. Candy stated, *inter alia,* that on January 4, 1973, prior to the receipt of the summons, he had delivered documents and files to Dr. Mason at the direction of his employer, Samuel H. Tannebaum, and relinquished to the taxpayer, Dr. Mason, the rightful, indefinite and legitimate possession of such documents and files (R. 17, 18). Attorney Kasmir stated in the Response, also under oath, that he had possession of certain documents and files delivered to him by Dr. Mason on January 4, 1973, and that his clients, Dr. and Mrs. Edward Mason, had specifically directed him to assert

on their behalf their rights under the Fourth and Fifth Amendments (R. 19-20). He declined to produce the documents covered by the summons on the grounds that the Government's attempt to obtain production amounted to an unreasonable search and seizure and that evidence contained in the documents would tend to incriminate the taxpayers and might be used as evidence against them in criminal proceedings for violation of the Internal Revenue laws (R. 19-22).

A hearing on the Petition and Response was held on March 28, 1973, as scheduled, and the Court entered an Order finding that the records belonged to the accounting firm of Tannebaum, Bindler & Lewis; finding that they were in the possession of C. D. Kasmir; ordering Mr. Kasmir to appear before Special Agent Mabrey and there to produce for inspection all of the accountant's work papers, reports, tax returns, and documents described in the summons; and further ordering Respondent Candy to appear before Special Agent Mabrey and to testify with respect to the accountant's records.[2] (R. 132-133). The Order was stayed pending appeal to the United States Court of Appeals for the Fifth Circuit (R. 134).

The Fifth Circuit reversed the Order of the District Court insofar as it had enforced the summons against Mr. Kasmir for production of the records, and affirmed the District Court's

[2] It is important to note that the District Court's Order enforcing the Internal Revenue Summons (R. 132) did *not* require Respondent Candy to produce documents and did *not* require Respondent Kasmir to testify. Moreover, the Government explicitly stated in the District Court that the testimony sought from Mr. Candy is "explanatory testimony on the records, that is all. We are asking Candy nothing about anything that might have happened since his relationship in the instant case with Kasmir was convened; we don't want to know that." (R. 11).

order with respect to Mr. Candy.[3] Thereafter, the Government filed its Petition for a Writ of Certiorari with this Court seeking review of the decision of the Fifth Circuit.

REASONS FOR DENYING THE WRIT

I.

THE ISSUE IN THIS CASE IS NEITHER CONTROVERSIAL NOR DOES IT REPRESENT A THREAT TO THE CONDUCT OF TAX INVESTIGATIONS.

The Government argues that to defeat an Internal Revenue summons under circumstances where the taxpayer "serves as a conduit for the transfer of the accountant's workpapers to the custody of the taxpayer's attorney" presents an issue "of major importance to the conduct of federal tax investigations" (Pet. at 7-8). Respondents not only take issue with the Government's characterization of this question, they respectfully submit that the questions presented by this case are not of major importance to the conduct of federal tax investigations.

[3] Due to the limited nature of the District Court's Order with respect to Mr. Candy, and *in express reliance* on the representations made by counsel for the Government, no challenge was made in the Court of Appeals to the validity of the District Court's Order with respect to Mr. Candy. His appeal was simply a protective appeal in order to insure that the Government did not change its interpretation of the District Court's Order by attempting to inquire into matters which Mr. Candy might have learned in the course of his employment by Mr. Kasmir in the instant case, which matters would be protected under the attorney-client privilege. See *United States v. Judson*, 322 F. 2d 460, 462 (9th Cir. 1963). Thus, Mr. Candy's appeal was not absolutely necessary to the disposition of the main issue in the Fifth Circuit which related to that portion of the District Court's Order directing Mr. Kasmir to produce the records in question.

A. The Government Erroneously Characterizes the Issue in this Case.

The Government's characterization of the issue in this case implies that the taxpayers somehow acted improperly by transferring the papers to their attorney and that by such transfer they attempted to improve their legal position. However, as the Fifth Circuit correctly perceived, the issue is not whether the taxpayers could have rightfully claimed the privilege had they retained the records themselves, for that was never put in issue[4] and was effectively conceded below.[5] See *United States v. Cohen,* 388 F. 2d 464 (9th Cir. 1967). Rather the thrust of the Government's argument is that the transfer of records from the taxpayers to their attorney effectively *decreased* the taxpayers' rights. As the Fifth Circuit stated:

> "If we hold that no Fifth Amendment privilege is now available, then the taxpayer's rights have been effectively decreased by his transfer. In a sense, the taxpayer is better off without an attorney."

499 F. 2d at 451.

Thus, the Government's position in this case is the same as it was more than ten years ago in *United States v. Judson,* 322 F. 2d 460 (9th Cir. 1963). As the Court there stated:

> "The government would have us hold that the taxpayer walked into his attorney's office unquestionably shielded with the Amendment's protection, and walked out with something less.
>
> * * *
>
> "The government has at its disposal inquisitorial powers

[4] 499 F. 2d at 452.

[5] R. 123. See also, *United States v. Judson,* 322 F. 2d 460, 466 (9th Cir. 1963) where a similar concession was made.

> and administrative procedures which it may invoke at its pleasure. If the government's position were sustained here, those powers could be utilized to stimulate a taxpayer's consultation with his attorney and the predictable transfer of his records. The government's powers could then be utilized to compel disclosure of those matters by the attorney whenever the taxpayer were not available to utter the magic words. In our judgment, the inherent power thus to compel indirectly an individual's self-incrimination is curbed by the Fifth Amendment as effectively as the power to compel the same result directly."

322 F. 2d at 466 and 468.

The undisputed facts of this case are that the Government advised the taxpayers of their right to counsel; that the taxpayers exercised that right by retaining counsel; that counsel, in order to effectively advise his clients, *predictably* took possession of the records from the taxpayers; and that all of this occurred prior to the time that any summons was served by the Government. Since this Court has held that "[t]he rights and obligations of the parties became fixed when the summons was served . . .,"[6] the Fifth Circuit correctly held that the taxpayers' actions taken prior to the issuance of the summons were "wholly proper." 499 F. 2d at 451. Moreover, the taxpayers never claimed any enlargement of their rights as a result of the transfer to their attorney. Rather, it is the Government which seeks to gain advantage from the fact that the taxpayers placed the records in the hands of their counsel. All the taxpayers sought was legal advice, including advice as to their constitutional rights. If the transfer of records to the taxpayers' attorney were held to result in the loss of the privilege against self-incrimination, nothing would be ac-

[6] *Couch v. United States,* 409 U.S. 322, 328, n. 9 (1973).

complished but the placing of an unnecessary and unconstitutional burden on the exercise of the privilege that would effectively force an accused to choose between the right to counsel on the one hand and the privilege against self-incrimination on the other. There is no sound reason to impose such a Hobson's choice on the accused. As the Fifth Circuit correctly stated:

> " . . . we . . . reject the idea that a taxpayer's right to be free from self-incrimination can be *decreased* or defeated by the taxpayer's transfer of records to his attorney pursuant to the attorney-client relationship." (Emphasis in original).

499 F. 2d at 452.

The real issue in this case is whether possession of records by the taxpayer's attorney previously in the actual possession of the taxpayer constituted sufficient constructive possession by the taxpayer to support his assertion of the privilege against self-incrimination. We submit that the law has long permitted assertion of the privilege in these circumstances.[6A]

The Government's misplaced reliance on dicta from *Matter of Harris*, 221 U.S. 274, 279-280 (1911) cannot change this result. *Matter of Harris, supra,* was a case in which an involuntary bankrupt was required to turn over his records to a receiver, despite a claim of self-incrimination. However, as this Court explained in *McCarthy v. Arndstein*, 266 U.S. 34, 41 (1924), *Matter of Harris* rests on the proposition that the privilege

[6A] *United States v. Judson*, supra; *Colton v. United States*, 306 F. 2d 633, 639 (2d Cir. 1962), *cert den.*, 371 U.S. 951 (1963); *Hughes v. Foster, Lewis, Langley & Onion*, ... F. Supp. ....., 65-1 U.S.T.C., ¶9418 (W.D. Tex. 1965); *Application of House*, 144 F. Supp. 95 (N.D. Cal. 1956); *People v. Minkowitz*, 220 N.Y. 399, 115 N.E. 987 (1917). See 8 Wigmore, *Evidence* (McNaughton Rev. 1961), §2307, pp. 593-595.

against self-incrimination relates to the "adjective law," i.e., to evidence and witnesses, and therefore the privilege does not prevent the true owner of property from obtaining its return. Since the bankruptcy petition in *Matter of Harris* operated to vest the receiver with title to the papers in question, the privilege, which is testimonial in nature, was not allowed to defeat the receiver's superior right of ownership. In this case, on the other hand, the Government's claim to the papers rests not on any claim to superior title, but solely on the adjectival claim to view the records for their evidentiary and testimonial content. *Matter of Harris* is, therefore, wholly inapplicable to this case. See *McCarthy v. Arndstein, supra,* 266 U.S. at 41. There is no doubt that in the circumstances of this case, the purpose of the Fifth Amendment privilege to prevent testimonial compulsion is directly implicated. See *Boyd* v. *United States,* 116 U.S. 616 (1886).

B. This Case Presents No Issue of Any Real Importance To The Conduct of Federal Tax Investigations and is Not Likely to Recur with Any Frequency.

We also reject the Government's thesis that this case presents an issue of "major importance to the conduct of federal tax investigations" (Pet. at 7-8). The fact situation in this case occurred only as the result of the Government's own actions and need never occur again in order for the tax laws to be effectively enforced. As shown by this Court's decision in *Couch* v. *United States,* 409 U.S. 322 (1973), there is no reason why the Government cannot initially proceed to summon accountant's workpapers directly from the accountant himself without first alerting the taxpayer to the fact that he is under criminal investigation. The Government has in its

possession the taxpayer's income tax returns. The accountants who prepare the returns are required by law to verify them, Reg. §1.6065-1(b) (1), by placing their signatures and addresses on the tax return. See Form 1040. If the Government had initially obtained the identity of the accountant from its copies of the taxpayer's return, and issued the summons to the accountant rather than first advising the taxpayer of the criminal tax investigation and attempting to obtain incriminating statements from the taxpayer, no issue with respect to the accountant's workpapers would ever have arisen. See *Couch* v. *United States, supra.* Thus, to say that this case presents an issue of "major importance to the conduct of federal tax investigations" is to greatly exaggerate its importance. This case presents no new or novel issues. See *United States v. Judson, supra.* Nor does it frustrate the Government's ability to obtain accountant's workpapers when proper procedures are followed. See *Couch v. United States, supra.* It simply presents a fact situation where, due to the Government's election to advertise in advance its intentions to the taxpayers, it has failed in its efforts to enforce part of the summons. Unless it can be said that every successful assertion of Fifth Amendment rights requires action by the Supreme Court, vindication of the Government's tactical decisions in this case does not warrant Supreme Court intervention.

II.

NO DIRECT CONFLICT WITH A DECISION OF ANOTHER COURT OF APPEALS IS PRESENTED BY THIS CASE.

The Government also argues that "the decision below

squarely conflicts with that of another Court of Appeals" (Pet. at 8), citing *United States v. Fisher,* 500 F. 2d 683 (3d Cir. 1974), and that this Court should grant a Writ of Certiorari to resolve that conflict. Unfortunately, the Government does not tell us wherein the conflict lies other than the fact that in one case the summons was enforced and in the other it was not. While it is true that the two cases have points of similarity, there are also major dissimilarities between them, specifically on the issues of "rightful possession" and "standing," which clearly distinguish the two cases and which permit them to be resolved on entirely different grounds. Since, as more fully explained below, the cases are susceptible of resolution without ever reaching the points of alleged conflict, the alleged conflict is not a sufficient reason for granting review. See Stern, *Denial of Certiorari Despite A Conflict,* 66 Harv. L. Rev. 465, 471 (1953).

A. The Cases Are Distinguishable on the Issue of Rightful Possession.

In *Couch v. United States, supra,* this Court reserved judgment on the issue of "what qualifies as rightful possession." 409 U.S. at 332, n. 12. A rightful possession issue arises where the true owner makes a demand on the taxpayer for the return of the papers in question. See *United States v. Cohen,* 388 F. 2d 464, 465, 468 (9th Cir. 1967); *Deck v. United States,* 339 F. 2d 739, 740 (D.C. Cir. 1964), *cert. den.,* 379 U.S. 967 (1965); *United States v. Riland,* 364 F. Supp. 120 (S.D. N.Y. 1973); *In re Grant,* 198 F. 708, 709 (S.D. N.Y. 1912), *aff'd 227* U.S. 74 (1913). While a rightful possession issue exists in *Fisher,* see 500 F. 2d at 685 and 696-

697 (dissenting opinion), no such issue exists in this case since the firm of Tannebaum, Bindler & Lewis *never* made a demand for the return of its papers. Moreover, its employee, Jerry Candy, acting at the direction of his employer, Samuel H. Tannebaum, has stated in a sworn answer that in delivering the documents in question, he relinquished to the taxpayers "the rightful, indefinite and legitimate possession" of such documents (R. 17, 18). Neither the District Court nor the Court of Appeals considered this case to involve an issue of "rightful possession," and the issue was not presented by the Government to either Court below.

In *Fisher*, on the other hand, a demand for the return of the papers in question was made by the accountant to the taxpayer, and the dissenting judge urged that the case be remanded to the District Court for further findings on this issue. Since the issue of rightful possession is not present in this case, should this Court decide to review *Fisher* in order to resolve the rightful possession issue, there is no need to review this case as well. Moreover, if this Court decides to deny review in both this case and *Fisher*, the cases will still be distinguishable on the issue of rightful possession. Finally, this Court should not grant review in both cases on the grounds of an alleged conflict, since the resolution of the rightful possession issue could easily cause any seeming conflict between the cases to disappear in the course of appellate review.

B. The Cases Are Distinguishable On The Issue of Standing.

The Government has raised a standing issue in this case which is not raised in the *Fisher* case "because the taxpayers

there intervened in the district court to assert the privilege for themselves." (Pet. at 12). However, the Government has overlooked the possibility that *Fisher* can be affirmed on the rightful possession issue, and that such affirmance would not necessitate reversal of this case. The Government has also overlooked the fact that if this case were reversed on the issue of standing, no points of conflict with *Fisher would ever be reached.*

Finally, the Government argues that even if *Fisher* is reversed, the Court should still review this case on the issue of standing. Respondents submit that the standing issue is not in and of itself of sufficient importance to warrant this Court's attention.

III.

THE STANDING QUESTION DOES NOT MERIT CONSIDERATION BY THIS COURT.

A. The Courts of Appeals Have Adequately Resolved the Standing Question.

The Government argues that this case conflicts with *Bouschor v. United States,* 316 F. 2d 451 (8th Cir. 1963) on the issue of standing, and that Supreme Court review should also be granted to consider this issue. Respondents submit that the reasons for such review are extremely weak.

To begin with, *Bouschor v. United States,* 316 F. 2d 451 (8th Cir. 1963), on which the Government relies, reflects a

clear minority position among the circuits,[7] and the alleged conflict on which review is so urgently sought has been outstanding for more than a decade with no discernible adverse consequences. More importantly, however, *Bouschor* is based on a clear misreading of Supreme Court cases and has seldom been followed. As pointed out by Judge Ainsworth in *United States v. White*, 477 F. 2d 757, 766, n. 4 (5th Cir. 1973) (dissenting opinion), *aff'd per curiam en banc*, 487 F. 2d 1335, *cert. den.*, October 15, 1974, *Bouschor* relied

> ". . . on dicta from Supreme Court cases where a mere agency relationship existed for the benefit of a public entity which had no Fifth Amendment privilege, such as in Rogers v. United States, 340 U.S. 367, 71 S. Ct. 438, 95 L. Ed. 344 (1951); United States v. White, 322 U.S. 694, 64 S. Ct. 1248, 88 L. Ed. 1542 (1944); McAlister v. Henkel, 201 U.S. 90, 26 S. Ct. 385, 50 L. Ed 671 (1906); and Hale v. Henkel, 201 U.S. 43, 26 S. Ct. 370, 50 L. Ed. 652 (1906)."

These cases are clearly inapplicable to a claim of privilege made on behalf of an individual.[8] Furthermore, the *Bouschor* decision entirely fails to consider that an attorney, unlike

[7] See *United States v. Judson*, 322 F. 2d 460, 463-465 (9th Cir. 1963); *Colton v. United States*, 306 F. 2d 633, 639 (2d Cir. 1962), *cert. den.*, 371 U.S. 951 (1963); *Brody v. United States*, 243 F. 2d 378, 387, n. 5 (1st Cir. 1957), *cert. den.*, 354 U.S. 923 (1957). See also, *United States v. Riland*, 364 F. Supp. 120, 121-122 (S.D. N.Y. 1973); and 8 *Wigmore*, Evidence, § 2307.

[8] See Lay, *Attorney's Assertion of His Client's Privilege Against Self-Incrimination in Criminal Tax Investigations*, 21 U. Miami L. Rev. 854, 864 (1967):

> "Hence, the attorney should be able to assert the Fifth Amendment privilege against self-incrimination for and on behalf of his taxpayer-client at any time the privilege exists and could be raised by the taxpayer personally. *Such a rule would not seem to contravene any decision of the Supreme Court for it appears that its use of the term 'personal privilege' has specific reference to the fact that no individual can assert it on behalf of an organization to which the privilege is inapplicable.* This is borne out by such statements that '[t]he constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals.' Thus, the concept of the privilege being a personal one should not prevent the attorney from raising it." (Emphasis added)

other agents, is capable of appearing on behalf of his client in legal proceedings and that, in effect, the attorney's appearance and his assertion of the privilege is tantamount to the client's appearance and assertion of the privilege. This is clearly the law with respect to the assertion of the attorney-client privilege which is also a "personal privilege."[9] Respondents have discovered no sound reason for distinguishing between the attorney-client privilege and the privilege against self-incrimination with respect to the attorney's standing to assert them on behalf of his client.

B. The Position Urged By The Government is Not in Accord with Decisions of This Court and is Wasteful of Limited Judicial Resources.

The Government states in its Petition that the privilege against self-incrimination, "like other privileges, may freely be waived by the person entitled to claim it" (Pet. at 11), thereby suggesting that the taxpayers' failure to intervene constituted a waiver of the privilege. This is clearly not the case. As pointed out by this Court in *Donaldson v. United States*, 400 U.S. 517, 531 (1971), an adverse ruling on the standing issue

f.n. 8 (Cont'd)

> *vidual can assert it on behalf of an organization to which the privilege is inapplicable.* This is borne out by such statements that '[t]he constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals.' Thus, the concept of the privilege being a personal one should not prevent the attorney from raising it." (Emphasis added)

[9] *Schwimmer v. United States*, 232 F. 2d 855, 863 (8th Cir. 1956), *cert. den.*, 352 U.S. 833 (1956); *Ex parte Lipscomb*, 239 S.W. 1101, 1103 (Tex. Sup. Ct. 1922). As said by the Court in *Ex parte Lipscomb, supra:*

> "Where the attorney objects to testifying upon the ground of privilege, it is to be regarded as the objection of the client."

See also, 8 Wigmore, *Evidence*, §2321 (McNaughton Rev. 1961).

in no way precludes the taxpayer from raising his privilege in any criminal proceeding that may eventually be brought against him. See also *United States v. Newman,* 441 F. 2d 165, 174 (5th Cir. 1971). Thus, the position urged by the Government is simply wasteful of limited judicial resources to no good purpose. Insistence on such a standing rule simply postpones until trial the day of reckoning when the privilege *can* be asserted. Such a postponement is unnecessarily costly to all concerned, for if the claim of privilege is valid now, it will be valid then and postponing the day for determination of that issue only means that the Government's intervening investigation and expenditure of public funds is likely to be wasted since any evidence the Government gathers resulting from the enforcement of the summons will probably be suppressed at trial as fruit of the poison tree. *Murphy v. Waterfront Commission of New York,* 378 U.S. 52, 79 (1964); *Wong Sun v. United States,* 371 U.S. 471 (1963).[10]

[10]This is not, of course, to say that a motion to suppress at trial is an adequate substitute for the nondisclosure of the records at the outset and the quashing of the summons. It clearly is not. Once the Government has the records, it can use them to develop evidence and follow leads in innumerable ways too subtle to trace and so long as the Government is careful to also develop some plausible "independent source" for the evidence it actually introduces at trial, it can profit from its improper acts. The taxpayer can easily lose in his subsequent efforts to show that the evidence used against him has an illegal source. See *Balistrieri v. United States,* 394 U.S. 985, 89 S. Ct. 1463, 22 L. Ed. 2d 761 (1969). While the suppression procedure is therefore entirely proper where no legal mechanism exists for stopping the disclosures in advance (e.g., where there are covert bugging activities or warrantless arrests), and suppression is the best remedy available under the circumstances, the availability of such a procedure at trial is no excuse for lending the Government the aid of the judiciary to enforce an unconstitutional disclosure in circumstances where the Courts have it within their power to prevent the abuse at the threshold.

C. While This Court Has Never Required Intervention, Its Sanction of the Intervention Procedure Makes it Unlikely That the Standing Issue Will Recur With Any Frequency in the Future.

Subsequent to the decision in *Bouschor,* this Court held that "third parties *might* intervene to protect their interests, or in the event the taxpayer is not a party to the summons before the hearing officer, he, too, *may* intervene." (Emphasis added) *Reisman v. Caplin,* 375 U.S. 440, 449 (1964). This Court has never *required* intervention. Thus, the Fifth Circuit was clearly correct when it held:

> "While there may be good reason to permit the taxpayer to intervene and to encourage the taxpayer to do so, we see no reason to require that procedure."

499 F. 2d at 454.

Since intervention is now available to taxpayers, it is unlikely that the standing issue will recur in the future with sufficient frequency to justify this Court's review.

D. The Government's Reasons For Requiring Intervention Will Not Withstand Scrutiny.

The Government argues that the taxpayers' presence at the hearing to enforce the summons should be required because "there may be need to determine whether the documents sought are the private papers of the claimant." (Pet. at 11). Respondents submit that this argument is simply an attempt to reimpose some kind of ownership test on the availability of the privilege against self-incrimination, a test which has been clearly rejected by this Court's decision in *Couch v. United States, supra,* 409 U.S. at 331, and 331, n. 12. Moreover, if the Government believed it was necessary to personally interrogate the taxpayers, it could have subpoened them to appear at the hearing. Not

only did the Government fail to exercise its right to have the taxpayers present at the hearing, it did not even raise the issue of standing until final argument, after the close of evidence (R. 112). Nor did the District Court rule on the question. Under these circumstances, we submit that the standing issue has been waived, *and is not properly before this Court.*[11]

E. Since the Standing Issue Is Largely of the Government's Own Making and Within Its Control, It Should Not Be Allowed To Impair The Taxpayer's Substantive Rights.

The standing issue is largely of the Government's own creation and elevates form over substance. It is well accepted practice in the federal courts to send a summons, a subpoena or a motion to produce to the party himself, even though in fact the documents in question may be in the actual possession of his attorney.[12] The physical location of the documents is unim-

[11]The simple fact is that there was nothing the taxpayers could have added to the testimony or Mr. Candy (the accountant), or Mr. Kasmir, or to the documentary evidence (e.g., the receipt) concerning either the question of ownership or possession. We are at a loss to understand what other testimony the Government seeks that would have been relevant to the disposition of this case. Furthermore, the Government's argument that there is a need to show that the papers are "private papers" is legally irrelevant. In *United States v. White*, 322 U.S. 694, 699 (1944), this Court stated that "the papers and effects which the privilege protects must be the private property of the person claiming the privilege, *or at least in his possession in a purely personal capacity.*" (Emphasis added) This concept of "possession in a purely personal capacity" was re-emphasized in *Couch v. United States, supra*, 409 U.S. at 330, n. 10. There was never any question that Dr. Mason received and held the papers in this case "in a purely personal capacity."

[12]*In re Ruppert*, 309 F. 2d 97, 98 (6th Cir. 1962); *Bifferato v. States Marine Corp. of Delaware*, 11 F.R.D. 44 (S.D.N.Y. 1951). See also, *Drehle v. Fleming*, 274 N.E. 2d 53 (Ill. Sup. Ct. 1971); *Williams v. Consolidated Investors, Inc.*, 472 P. 2d 248 (Kan. Sup. Ct. 1970); *Unger v. Los Angeles Transit Lines*, 4 Cal. Rptr. 370 (Dist. Ct. of App. 1960).

portant. Basically, the test is control.[13] So long as the attorney is subject to the direction and control of his client, the attorney must produce records in his possession when the client is subpoened.[14] If the Government had served its summons upon the taxpayer in this case once it learned that the papers it sought were in the possession of the taxpayer's attorney, no issue of standing would now exist. In view of the Government's representations to this Court in the *Couch* case that in situations where the taxpayer "retains possession and control of the records, it ordinarily issues the summons to the taxpayer because it is the taxpayer who has the dominion over the records and the authority to return the summons," *Couch v. United States, supra*, 409 U.S. 334, n. 18, we fail to understand what purpose was served by issuance of a summons to the taxpayers' attorney in this case, except to interject into the enforcement proceeding a spurious standing issue that might improve the Government's legal position. Since the real parties in interest were the taxpayers, the summons should have been served upon them rather than upon their attorney. The fact that the Government chose to serve the taxpayers' attorney should not be allowed to impair the constitutional rights of the taxpayers.

IV.

CONCLUSION

The issues in this case have been correctly resolved by the Court below and do not involve fact situations that are likely

[13]*Schwimmer v. United States*, 232 F. 2d 855, 860 (8th Cir. 1956), *cert. den.*, 352 U.S. 833 (1956); *In re Rivera*, 79 F. Supp. 510 (S.D.N.Y. 1948); *Alma-Schuhfabrik AG v. Rosenthal*, 25 F.R.D. 100 (E.D.N.Y. 1960).

[14]See cases cited at footnote 12. Compare *In re National Public Utility Investing Corporation*, 79 F. 2d 302 (2d Cir. 1935).

to recur with any frequency. The instant decision does not threaten the Government's ability to conduct tax investigations, nor does it present any new or novel questions of law. The issues have been before the Courts of Appeals for some time and the Government's occasional failure to enforce a summons has had no discernible adverse effect on its conduct of tax investigations. Finally, the alleged conflicts are more apparent than real.

For the reasons stated, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true copy of the foregoing "Brief of Respondents in Opposition" has been mailed, certified mail, return receipt requested, to the Honorable Robert H. Bork, Solicitor General of the United States, United States Department of Justice, Washington, D. C. 20530, this 6th day of January, 1975.

CYRIL D. KASMIR